

GERARDO LUCIANO TAPIA,) Case No. EDCV 17-01106-ODW (AS)
)
 Petitioner,) **ORDER OF DISMISSAL**
)
)
 v.)
)
 J.L. SULLIVAN, Warden,)
)
 Respondent.)

On June 6, 2017, Gerardo Luciano Tapia ("Petitioner"), a California state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition").¹ Petitioner challenges his 57-year sentence resulting from his 2010 convictions for seven counts of

¹ On June 27, 2017, the Court granted Petitioner's Request for Leave to Proceed *in Forma Pauperis* after Petitioner submitted a Certified Trust Fund Statement signed by an authorized officer at the prison. See Docket Entry Nos. 5-6.

1 committing a lewd and lascivious act on a child under age
2 fourteen by force, violence, duress, menace or fear and one count
3 of attempted aggravated sexual assault of a child under age
4 fourteen, in Riverside County Superior Court (Case No.
5 RIF150883).² The Petition alleges the following ground for
6 federal habeas relief: Petitioner received an excessive sentence
7 because the trial court sentenced him to consecutive terms, in
8 violation of Cunningham v. California, 549 U.S. 270 (2007)³;
9 Petitioner is innocent. (Petition at 6-6(a)).⁴

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² The Court takes judicial notice of the pleadings in
12 Gerardo Luciano Tapia v. Kim Holland, Warden, Case No. EDCV 14-
13 01692-ODW (RNB).

14 ³ In Cunningham v. California, 549 U.S. at 293, the
15 Supreme Court held that California's Determinate Sentencing Law
16 ("DSL") violated a defendant's Sixth Amendment right to trial by
17 jury "by placing sentence-elevating factfinding within the
18 judge's province." The Supreme Court found that "the middle term
19 [of twelve years] prescribed in California's statutes, not the
20 upper term [of sixteen years], is the relevant statutory
21 maximum," id. at 275, 288-89, and then held that: "[b]ecause
22 circumstances in aggravation are found by the judge, not the
23 jury, and need only be established by a preponderance of the
24 evidence, not beyond a reasonable doubt, the DSL violates
25 Apprendi's bright-line rule: Except for a prior conviction, "any
26 fact that increases the penalty for a crime beyond the prescribed
27 statutory maximum must be submitted to a jury, and proved beyond
28 a reasonable doubt." Id. at 288-89 (citations omitted).

⁴ To the extent that Petitioner is attempting to seek
relief from Judgment in Case No. EDCV 14-01692-ODW (RNB) under
Rule 60(b)(6), Petitioner has failed to show extraordinary
circumstances justifying the reopening of a final judgment. See
Gonzalez v. Crosby, 545 U.S. 524, 536 (2005); LaFarge Concrets et
Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1338
(9th Cir. 1986) (citations omitted); see also Lehman v. United
States, 154 F.3d 1010, 1017 (9th Cir. 1998) ("To receive Rule
60(b)(6) relief, a moving party must show both injury and that
circumstances beyond [his or her] control prevented timely action
to protect [his or her] interests.").

1 On August 15, 2014, Petitioner filed a Petition for Writ of
2 Habeas Corpus by a Person in State Custody by a Person in State
3 Custody pursuant to 28 U.S.C. § 2254, in which he challenged the
4 same 2010 convictions ("prior habeas action"). See Gerardo
5 Luciano Tapia v. Kim Holland, Warden, Case No. EDCV 14-01692-ODW
6 (RNB) (Docket Entry No. 1). On April 21, 2015, the Court issued
7 an Order and Judgment denying that habeas petition and dismissing
8 the action with prejudice, in accordance with the findings and
9 recommendations of the assigned Magistrate Judge. (Id.; Docket
10 Entry Nos. 25-26). On the same date, the Court denied Petitioner
11 a certificate of appealability. (Id.; Docket Entry No. 24). On
12 April 27, 2017, Petitioner filed a "Motion to Reopen Time for
13 Appeal," which the Court denied on May 8, 2017. (Id.; Docket
14 Entry Nos. 32, 34).

15
16 On March 21, 2017, Petitioner filed a "Petition for Writ of
17 Mandate/Prohibition," which the Court construed as a Petition for
18 Writ of Habeas Corpus by a Person in State Custody pursuant to 28
19 U.S.C. § 2254 (see Docket Entry No. 3 at 1), in which he
20 challenged the same 2010 convictions. See Gerardo Luciano Tapia
21 v. United States District Court, Central District of California,
22 Case No. EDCV 17-00525-ODW (AS) (Docket Entry No. 1). On March
23 24, 2017, the Court issued an Order and Judgment dismissing the
24 action without prejudice as an unauthorized second or successive
25 petition. (Id.; Docket Entry Nos. 3-4). On the same date, the
26 Court denied Petitioner a certificate of appealability. (Id.;
27 Docket Entry No. 5). On May 4, 2017, the Ninth Circuit denied
28 Petitioner's request for a certificate of appealability. (Id.;

1 Docket Entry No. 8).

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4 **II. DISCUSSION**

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6 The Antiterrorism and Effective Death Penalty Act of 1996
7 ("AEDPA"), enacted on April 24, 1996, provides in pertinent part
8 that:

9
10 (a) No circuit or district judge shall be
11 required to entertain an application for a writ of
12 habeas corpus to inquire into the detention of a
13 person pursuant to a judgment of a court of the
14 United States if it appears that the legality of such
15 detention has been determined by a judge or court of
16 the United States on a prior application for a writ
17 of habeas corpus, except as provided in §2255.

18 (b)(1) A claim presented in a second or
19 successive habeas corpus application under section
20 2254 that was presented in a prior application shall
21 be dismissed.

22 (2) A claim presented in a second or successive
23 habeas corpus application under section 2254 that was
24 not presented in a prior application shall be
25 dismissed unless--

26 (A) the applicant shows that the claim relies on
27 a new rule of constitutional law, made retroactive to
28 cases on collateral review by the Supreme Court, that

1 was previously unavailable; or

2 (B) (i) the factual predicate for the claim could
3 not have been discovered previously through the
4 exercise of due diligence; and

5 (ii) the facts underlying the claim, if proven
6 and viewed in light of the evidence as a whole, would
7 be sufficient to establish by clear and convincing
8 evidence that, but for constitutional error, no
9 reasonable fact finder would have found the applicant
10 guilty of the underlying offense.

11 (3) (A) Before a second or successive application
12 permitted by this section is filed in the district
13 court, the applicant shall move in the appropriate
14 court of appeals for an order authorizing the
15 district court to consider the application.

16 (B) A motion in the court of appeals for an
17 order authorizing the district court to consider a
18 second or successive application shall be determined
19 by a three-judge panel of the court of appeals.

20 (C) The court of appeals may authorize the
21 filing of a second or successive application only if
22 it determines that the application makes a prima
23 facie showing that the application satisfies the
24 requirements of this subsection.

25 (D) The court of appeals shall grant or deny the
26 authorization to file a second or successive
27 application not later than 30 days after the filing
28 of the motion.

1 (E) The grant or denial of an authorization by
2 a court of appeals to file a second or successive
3 application shall not be appealable and shall not be
4 the subject of a Petition for Rehearing or for a Writ
5 of Certiorari.

6 (4) A district court shall dismiss any claim
7 presented in a second or successive application that
8 the court of appeals has authorized to be filed
9 unless the applicant shows that the claim satisfies
10 the requirements of this section. 28 U.S.C. § 2244.

11
12 28 U.S.C. § 2244(b) (3) "creates a 'gatekeeping' mechanism for
13 the consideration of second or successive applications in district
14 court. The prospective applicant must file in the court of
15 appeals a motion for leave to file a second or successive habeas
16 application in the district court. § 2244(b) (3) (A)." Felker v.
17 Turpin, 518 U.S. 651, 657(1996).

18
19 The instant Petition and the prior habeas action both
20 challenge Petitioner's custody pursuant to the same 2010 judgment
21 entered by the Riverside County Superior Court. Accordingly, the
22 instant Petition, filed on June 6, 2017, well after the effective
23 date of the AEDPA, is a second or successive habeas petition for
24 purposes of 28 U.S.C. § 2244. Therefore, Petitioner was required
25 to obtain authorization from the Court of Appeals before filing
26 the present Petition. See 28 U.S.C. §2244(b) (3) (A). No such
27 authorization has been obtained in this case.

1 Moreover, the claims asserted in the instant Petition do not
2 appear to fall within the exceptions to the bar on second or
3 successive petitions because the asserted claims are not based on
4 newly discovered facts or a "a new rule of constitutional law,
5 made retroactive to cases on collateral review by the Supreme
6 Court, that was previously unavailable." Tyler v. Cain, 533 U.S.
7 656, 662 (2001). However, this determination must be made by the
8 United States Court of Appeals upon a petitioner's motion for an
9 order authorizing the district court to consider his second or
10 successive petition. 28 U.S.C. § 2244(b); see Burton v. Stewart,
11 549 U.S. 147, 157 (2007) (where the petitioner did not receive
12 authorization from the Court of Appeals before filing second or
13 successive petition, "the District Court was without jurisdiction
14 to entertain [the petition]"); Barapind v. Reno, 225 F.3d 1100,
15 1111 (9th Cir. 2000) ("[T]he prior-appellate-review mechanism set
16 forth in § 2244(b) requires the permission of the court of appeals
17 before 'a second or successive habeas application under § 2254'
18 may be commenced."). Because Petitioner has not obtained
19 authorization from the Ninth Circuit Court of Appeals, this Court
20 cannot entertain the present Petition. See Burton v. Stewart,
21 supra.

22
23 To the extent that Petitioner is attempting to allege a claim
24 of actual innocence in an attempt to bypass the successive
25 petition hurdle, see McQuiggin v. Perkins, 133 S.Ct. 1924, 1928
26 (2013) ("We hold that actual innocence, if proved, serves as a
27 gateway through which a petitioner may pass whether the impediment
28 is a procedural bar, as it was in *Schlup* and *House*, or, as in this

1 case, expiration of the statute of limitations), Petitioner has
2 failed to show the actual innocence exception applies in his case.
3 Under the actual innocence exception to the statute of
4 limitations, a petitioner must show that “in light of the new
5 evidence, no juror, acting reasonably, would have voted to find
6 him guilty beyond a reasonable doubt.” McQuiggin v. Perkins,
7 supra (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)); see
8 House v. Bell, 547 U.S. 518, 538 (2006) (“A petitioner’s burden
9 at the gateway stage is to demonstrate that more likely than not,
10 in light of the new evidence, no reasonable juror would find him
11 guilty beyond a reasonable doubt-or, to remove the double
12 negative, that more likely than not any reasonable juror would
13 have reasonable doubt.”).

14
15 Here, Petitioner’s asserted claim of actual innocence is
16 merely a claim of sentencing error. See Bousley v. United States,
17 523 U.S. 614, 623 (1998) (“‘Actual innocence’ means factual
18 innocence, not mere legal insufficiency.”); Morales v. Ornoski,
19 439 F.3d 529, 533-34 (9th Cir. 2006). Moreover, Petitioner has
20 not even purported to make a showing of actual innocence,
21 supported by new reliable evidence. See Schlup v. Delo, 513 U.S.
22 at 324 (“To be credible, [a claim of actual innocence] requires
23 petitioner to support his allegations of constitutional error with
24 new reliable evidence--whether it be exculpatory scientific
25 evidence, trustworthy eyewitness accounts, or critical physical
26 evidence--that was not presented at trial.”). Petitioner simply
27 has not presented an “exceptional case[] involving a compelling
28 claim of actual innocence.” House v. Bell, 547 U.S. at 521; see

1 Schlup v. Delo, supra ("[E]xperience has taught us that a
2 substantial claim that constitutional error has caused the
3 conviction of an innocent person is extremely rare."); McQuiggin
4 v. Perkins, supra ("We caution, however, that tenable actual-
5 innocence gateway pleas are rare").

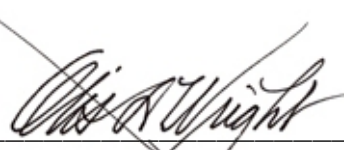
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7 Consequently, it does not appear that the actual innocence
8 exception to filing a successive petition would apply, although
9 this is a determination which must be made by the Ninth Circuit
10 Court of Appeals.

11
12 **III. ORDER**

13
14 ACCORDINGLY, IT IS ORDERED that the Petition be dismissed
15 without prejudice.

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17 LET JUDGMENT BE ENTERED ACCORDINGLY.

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19 DATED: July 5, 2017

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22 _____
23 OTIS D. WRIGHT, II
24 UNITED STATES DISTRICT JUDGE
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